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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider the
Adoption of a General Order and Procedures
to Implement the Digital Infrastructure and
Video Competition Act of 2006.

R.06-10-005

**OPENING COMMENTS
OF SUREWEST TELEVIDEO (U 6324 C)
ON PHASE II ISSUES**

E. Garth Black
Mark P. Schreiber
Sean P. Beatty
Patrick M. Rosvall
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, California 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530

Attorneys for SureWest TeleVideo

May 31, 2007

I. INTRODUCTION.

Pursuant to the Assigned Commissioner's Ruling dated May 7, 2007 ("ACR"), SureWest TeleVideo ("STV") submits these opening comments on Phase II issues identified in the ACR that pertain to open issues relative to the implementation of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA").

Of the topics identified in the ACR, STV is primarily interested in the build-out requirements for entities with less than 1,000,000 telephone customers. In whatever action the Commission takes on this topic, it should remember that the legislature's intent was to apply less onerous build-out requirements to smaller providers than had been mandated in statute for larger providers. These companies lack the financial resources and abilities that the large companies have and, therefore, were allowed some flexibility in the legislation to build-out facilities in their areas. In addition, STV supports establishment of a safe harbor for build-out by smaller providers, while at the same time providing smaller providers the flexibility to demonstrate that their build-out is consistent with DIVCA.

With respect to other topics raised in the ACR, STV opposes the creation of any additional reporting requirements in reliance on DIVCA. At this time, STV has not identified any other of the Commission's rules of practice and procedure that require amendment to conform to new procedures under DIVCA. Finally, STV approves of the ACR's tentative conclusion to refrain from adopting renewal provisions at this time.

II. BUILD-OUT REQUIREMENTS APPLIED TO SMALLER PROVIDERS SHOULD RECOGNIZE THE DISTINCT TREATMENT AFFORDED TO THEM BY THE LEGISLATURE.

In adopting a new framework for the administration of video franchises, the Legislature was clearly concerned with the possibility that video providers might discriminate against potential subscribers based on their income.¹ Although the original version of AB 2897 did not include build-out requirements, negotiations between stakeholders and legislators that led to the ultimate adoption of AB 2897 included extensive discussions regarding reasonable build-out requirements to impose on state-issued video franchise holders.

¹ See Cal. Public Util. Code § 5890(a).

During those negotiations, the large companies, AT&T and Verizon, agreed to abide by concrete build-out requirements. In particular, Section 5890(e) establishes mandatory build-out requirements for "holders or their affiliates with more than 1,000,000 telephone customers in California." Those build-out requirements vary depending upon whether the provider is predominantly deploying fiber optic facilities to the customer's premises. For systems that are predominantly fiber-based, the large provider must provide access to at least 25% of households within two years after it begins providing service and to at least 40% of households within five years.² For non-fiber-based systems, the large provider must provide access to at least 35% of households within three years after it begins providing service and to at least 50% of households within five years.³ There are additional build-out requirements specific to low-income households that apply to large companies as well.⁴

STV participated in the stakeholder negotiations that led to the adoption of AB 2987, and Section 5890 in particular. STV made it clear in those negotiations that smaller providers should not be subject to the same, inflexible build-out requirements applied to the larger providers. The Legislature incorporated STV's concerns into the final version of AB 2897. Instead of applying concrete build-out standards to smaller providers, AB 2987 adopted a more relaxed approach. Specifically, smaller providers are only required to build-out facilities within a reasonable time and are not required to build-out at all in geographic areas where "the cost to provide video service is substantially above the average cost of providing video service in that telephone service area."⁵ Against this backdrop, the ACR seeks further input on two compliance mechanisms relative to the build-out requirements for smaller providers: (1) safe harbors; and (2) case-by-case determinations.⁶

² Cal. Public Util. Code § 5890(e)(1).

³ Cal. Public Util. Code § 5890(e)(2).

⁴ Cal. Public Util. Code § 5890(b).

⁵ Cal. Public Util. Code § 5890(c).

⁶ See ACR, pp. 2-3.

A. Small Provider Build-Out Safe Harbors.

STV contends that the Commission should adopt safe harbor benchmarks for build-out which, if met, would conclusively demonstrate compliance with Section 5890(c). Consistent with legislative intent that the build-out requirements in Section 5890(e) are too ambitious for smaller providers, STV proposes safe harbor benchmarks that would incorporate the same coverage requirements found in Section 5890(e), but would provide smaller providers additional time to meet those coverage requirements. Specifically, the Commission should establish small provider safe harbors as follows:

Predominantly Fiber-Based Systems

Four Years	25% of Households
Ten Years	40% of Households

Non-Fiber-Based Systems

Six Years	35% of Households
Ten Years	50% of Households

STV's proposed timelines double the number of years that a small provider has to meet the same threshold levels in the legislation. Adopting safe harbors along these lines will recognize the differences smaller providers face relative to build-out constraints as compared to larger providers, in particular access to capital, while at the same time are consistent with the Legislature's build-out requirements in the service areas of the large providers.

B. Case-by-Case Build-Out Analysis.

Although STV believes its proposed small provider safe harbors are reasonably attainable, what constitutes a "reasonable time" for build-out will differ from provider to provider. Because Section 5890(c) reserves to the Commission the authority to determine what constitutes a "reasonable time" for smaller provider build-out, STV contends the Commission should retain flexibility in determining what constitutes a reasonable time for each individual smaller provider. Consistent with this approach, the Commission should permit each individual smaller provider to make its own showing as to why its build-out is proceeding within a

reasonable time. It would be appropriate to place the burden of proof on the smaller provider to demonstrate compliance with the reasonable time requirement.

STV does not agree with the ACR's assumption that a reasonable build-out period must be identified at the application stage.⁷ Nothing in Section 5840(e) suggests that a detailed showing regarding build-out must be included in the video franchise application.⁸ The reporting requirements in General Order 169, Section VII.C.1.(3) permit the Commission to monitor build-out progress for each individual video franchisee. If the Commission believes that a particular smaller provider is not progressing sufficiently toward a reasonable time build-out, the Commission can open an investigation into the issue, placing the burden of proof on that provider as to whether build-out is occurring within a reasonable time. Local jurisdictions could also submit complaints to the Commission if they believe a smaller provider has not satisfied the reasonable time build-out requirement.⁹ In either case, the determination of what constitutes a reasonable time will rest with the Commission, consistent with the provisions of Section 5890(c).

One example of why the Commission should retain a flexible approach to the reasonable time build-out standard is the presence of exclusive agreements obtained by incumbent video providers. Statistics show that 33% of housing in California is in the form of multiple dwelling units ("MDUs"). Where STV has facilities and operates today, approximately 50% of MDUs are locked up by other video providers through exclusive service agreements. STV believes that such exclusivity deals are bad for a newly competitive market by preventing the customer from choosing his/her cable provider of choice and that the Commission should take action to eliminate, or at a minimum marginalize, the use of exclusive agreements to provide video service. Until that happens, though, the Commission should recognize that deployment decisions by smaller companies will be guided by this and other economic issues (e.g., cost to provide video service to an area that is above the average cost of providing video service to other areas), and as a result, a company should not be required to build-out in certain areas.¹⁰

⁷ See ACR, p. 4.

⁸ Section 5840(e)(8) requires an expected date for deployment of service within a particular area, but it does not specify a complete build-out schedule.

⁹ Cal. Public Util. Code § 2890(g).

¹⁰ See Cal. Public Util. Code §§ 2890(c), 2890(f)(3)(ii).

III. NO ADDITIONAL REPORTING REQUIREMENTS ARE NECESSARY.

The ACR pursues the question whether the Commission needs additional, more detailed broadband and video information for enforcement of specific DIVCA provisions. As STV has contended throughout this proceeding, the Commission should adhere closely to DIVCA, and any reporting requirements contemplated under DIVCA have already been implemented in Phase I.

Tracking language from D.07-03-014, the ACR implies that legislative intent to (i) promote widespread access to technologically advanced cable and video services, and (ii) complement efforts to increase investment in broadband infrastructure and close the digital divide could constitute sufficient statutory authority to impose additional reporting requirements on video franchise holders.¹¹ If anything, this legislative intent is an argument against additional reporting requirements. AB 2987 is a pro-competition bill. AB 2987 evidences the Legislature's determination that opening up competition in the video marketplace constitutes the best chance to promote widespread access to advanced technology or to increase investment in broadband infrastructure. Imposing additional reporting requirements on participants in a competitive marketplace adds costs that reduces resources that should more appropriately be directed at the investment intended by the Legislature.

The ACR also quotes out of context language in Section 5890(f)(4) requiring a "substantial and continuous effort" to meeting build-out requirements as a possible basis for creating additional reporting requirements.¹² Section 5890(f)(4) sets forth the standard for obtaining extension of the various statutory build-out requirements in DIVCA. The standard only applies in the context where a provider seeks an extension. It would be an abuse of discretion, therefore, to rely on this standard to create a reporting requirement that applies regardless of whether a provider seeks such an extension.

The ACR is also wrong to interpret a broad enforcement role for the Commission under DIVCA.¹³ Section 5820(c) establishes legislative intent that the Commission only has authority

¹¹ See ACR, p. 4.

¹² See ACR, pp. 4-5.

¹³ The ACR, citing D.07-03-014, asks whether additional reports are necessary for "enforcement of specific DIVCA provisions."

to regulate video franchisees to the extent **explicitly** set forth in DIVCA. Looking to broad statements of legislative intent as a basis for authority to invoke reporting requirements beyond those explicitly created in DIVCA would violate Section 5820(c).

IV. REVISIONS TO RULES OF PRACTICE AND PROCEDURE.

At this time, STV has not identified any other Rules of Practice and Procedure that must be amended to conform to the statutory provisions of DIVCA.

V. POSTPONING ADOPTION OF FRANCHISE RENEWAL RULES.

STV does not oppose the ACR's proposal to postpone adoption of rules addressing renewal of state-issued video franchises. STV recommends, however, that such rules should be in place at least a year prior to the expiration of the initial grants of franchises. Video providers should have sufficient time to evaluate renewal requirements and the opportunity to ensure compliance with whatever renewal rules are adopted.

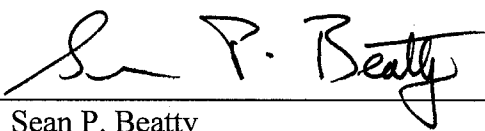
VI. CONCLUSION.

Based on the foregoing, the Commission should adopt safe harbor build-out benchmarks for smaller providers as described above while at the same time preserving for smaller providers the option of contending that their build-out is occurring within a reasonable time without reference to the safe harbor benchmarks. The Commission should not adopt additional reporting requirements beyond those explicitly identified in DIVCA. STV is not aware of any further modification of the Commission's Rules of Practice Procedure necessary to conform the Rules to the statutory requirements of DIVCA. Finally, the Commission may delay adoption of renewal rules, but such rules should be in place sufficiently in advance of the first expiration date to provide the provider a reasonable opportunity to meet whatever renewal standards the Commission adopts.

Dated this 31st day of May, 2007, at San Francisco, California.

E. Garth Black
Mark P. Schreiber
Sean P. Beatty
Patrick M. Rosvall
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, CA 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530

By: _____



Sean P. Beatty

Attorneys for SureWest TeleVideo

CERTIFICATE OF SERVICE

I, Noel Gielegthem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.


On May 31, 2007, I served the following OPENING COMMENTS OF SUREWEST TELEVIDEO (U 6324 C) ON PHASE II ISSUES by placing a true and correct copy thereof with the firm's mailing room personnel, for mailing in accordance with the firm's ordinary practices, addressed to the parties on the CPUC service list for Proceeding No. R. 06-10-005.

Copies were also hand delivered to Assigned ALJs Kotz and Sullivan and Assigned Commissioner Chong.

Copies were also served via e-mail on those parties on the service list who provided an e-mail address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 31, 2007, at San Francisco, California.



Noel Gielegthem

SERVICE LIST

CPUC Service List as of May 11, 2007 Proceeding No. R. 06-10-005

ALLEN S. HAMMOND, IV
PROFESSOR OF LAW
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 EL CAMINO REAL
SANTA CLARA, CA 94305

ANDRES F. IRLANDO, VICE PRESIDENT
VERIZON CALIFORNIA, INC.
112 LAKEVIEW CANYON ROAD
THOUSAND OAKS, CA 91362

ANNE NEVILLE
CALIF PUBLIC UTILITIES COMMISSION
CARRIER BRANCH
AREA 3-E
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM HUGHES
ASSISTANT CITY ATTORNEY
CITY OF SAN JOSE
16TH FLOOR
200 EAST SANTA CLARA STREET
SAN JOSE, CA 95113-1900

CHARLES BORN, MANAGER
GOVERNMENT & EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS OF
CALIFORNIA
9260 E. STOCKTON BLVD.
ELK GROVE, CA 95624

CYNTHIA J. KURTZ, CITY MANAGER
CITY OF PASADENA
117 E. COLORADO BLVD., 6TH FLOOR
PASADENA, CA 91105

DAVID J. MILLER, ATTORNEY AT LAW
AT&T CALIFORNIA
525 MARKET STREET, ROOM 2018
SAN FRANCISCO, CA 94105

ALOA STEVENS, DIRECTOR,
GOVERNMENT&EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 708970
SANDY, UT 84070-8970

ANITA C. TAFF-RICE, ATTORNEY AT LAW
1547 PALOS VERDES MALL, SUITE 298
WALNUT CREEK, CA 94597

ALIK LEE
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS & CONSUMER
ISSUES BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BARRY F. MCCARTHY, ESQ.
ATTORNEY AT LAW
MCCARTHY & BARRY LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

RICHARD CHABRAN
CALIFORNIA COMMUNITY
TECHNOLOGY POLICY
1000 ALAMEDA STREET, SUITE 240
LOS ANGELES, CA 90012

CHRISTINE MAILLOUX, ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

DAVID J. MILLER, ATTORNEY AT LAW
AT&T CALIFORNIA
525 MARKET STREET, ROOM 2018
SAN FRANCISCO, CA 94105

APRIL MULQUEEN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ANN JOHNSON
VERIZON
HQE02F61
600 HIDDEN RIDGE
IRVING, TX 75038

BARRY FRASER
CIYT OF SAN FRANCISCO
875 STEVENSON STREET, 5TH FLOOR
SAN FRANCISCO, CA 94103

BILL NUSBAUM
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

GERALD R. MILLER
CITY OF LONG BEACH
333 WEST OCEAN BLVD.
LONG BEACH, CA 90802

DAVID HANKIN, VP
GOVERNMENT AFFAIRS
RCN CORPORATION
1400 FASHION ISLAND BLVD., SUITE 100
SAN MATEO, CA 94404

DELANEY HUNTER
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

DOUGLAS GARRETT
COX COMMUNICATIONS
2200 POWELL STREET, STE. 1035
EMERYVILLE, CA 94608

DAVID C. RODRIGUEZ
STRATEGIC COUNSEL
523 WEST SIXTH STREET, SUITE 1128
LOS ANGELES, CA 90014

EDWARD RANDOLPH
ASM LEVINE'S OFFICE
ASSEMBLY COMMITTEE/UTILITIES
AND COMMERCE
STATE CAPITOL ROOM 5136
SACRAMENTO, CA 95814

ELAINE M. DUNCAN
ATTORNEY AT LAW
VERIZON
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO, CA 94102

ENRIQUE GALLARDO
LATINO ISSUES FORUM
160 PINE STREET, SUITE 700
SAN FRANCISCO, CA 94111

ESTHER NORTHRUP
COX CALIFORNIA TELCOM, LLC
5159 FEDERAL BLVD.
SAN DIEGO, CA 92105

FASSIL FENKILE
AT&T CALIFORNIA
525 MARKET STREET, ROOM 1925
SAN FRANCISCO, CA 94105

MICHAEL J. FRIEDMAN, VICE PRESIDENT
TELECOMMUNICATIONS
MANAGEMENT CORP.
5757 WILSHIRE BLVD., SUITE 635
LOS ANGELES, CA 90036

GREG R. GIERCZAK,
EXECUTIVE DIRECTOR
SURE WEST TELEPHONE
PO BOX 969
200 VERNON STREET
ROSEVILLE, CA 95678

GREGORY T. DIAMOND
7901 LOWRY BLVD.
DENVER, CO 80230

GREG FUENTES
11041 SANTA MONICA BLVD., NO.629
LOS ANGELES, CA 90025

GRANT KOLLING
SENIOR ASSISTANT CITY ATTORNEY
CITY OF PALO ALTO
250 HAMILTON AVENUE, 8TH FLOOR
PALO ALTO, CA 94301

GLENN SEMOW, DIRECTOR
STATE REGULATORY & LEGAL AFFAIR
CALIFORNIA CABLE &
TELECOMMUNICATIONS
360 22ND STREET, NO. 750
OAKLAND, CA 94612

GREG STEPHANICICH
RICHARDS, WATSON & GERSHON
44 MONTGOMERY STREET, SUITE 3800
SAN FRANCISCO, CA 94104-4811

GRANT GUERRA
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120-7442

TIM HOLDEN
SIERRA NEVADA COMMUNICATIONS
PO BOX 281
STANDARD, CA 95373

IZETTA C.R. JACKSON
OFFICE OF THE CITY ATTORNEY
CITY OF OAKLAND
1 FRANK H. OGAWA PLAZA, 10TH FLR.
OAKLAND, CA 94612

MARGARET L. TOBIAS
TOBIAS LAW OFFICE
460 PENNSYLVANIA AVENUE
SAN FRANCISCO, CA 94107

JENNIE CHANDRA
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5141
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOSEPH WANZALA
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES &
PRICING BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOSE E. GUZMAN, JR.
NOSSAMAN GUTHNER KNOX
& ELLIOTT LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO, CA 94111-4799

JOE CHICOINE, MANAGER, STATE
GOVERNMENT AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 340
ELK GROVE, CA 95759

JEFFREY SINSHEIMER
CALIFORNIA CABLE &
TELECOMMUNICATIONS
360 22ND STREET, 750
OAKLAND, CA 94612

KATIE NELSON
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

KELLY E. BOYD
NOSSAMAN, GUTHNER, KNOX
AND ELLIOTT
915 L STREET, SUITE 1000
SACRAMENTO, CA 95814

STEVEN KOTZ
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE
LAW JUDGES
ROOM 2251
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LONNIE ELDRIDGE
DEPUTY CITY ATTORNEY
CITY ATTORNEY'S OFFICE
CITY HALL EAST, SUITE 700
200 N. MAIN STREET
LOS ANGELES, CA 90012

MAGGLE HEALY
CITY OF REDONDO BEACH
415 DIAMOND STREET
REDONDO BEACH, CA 90277

MARK RUTLEDGE
TELECOMMUNICATIONS FELLOW
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLR.
BERKELEY, CA 94704

MARIA POLITZER
LEGAL DEPARTMENT ASSOCIATE
CALIFORNIA CABLE TELEVISION
ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

PHILIP KAMLARZ
CITY OF BERKELEY
2180 MILVIA STREET
BERKELEY, CA 94704

KEN SIMMONS
ACTING GENERAL MANAGER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1400
200 N. MAIN STREET
LOS ANGELES, CA 90012

JONATHAN L. KRAMER
ATTORNEY AT LAW
KRAMER TELECOM LAW FIRM
2001 S. BARRINGTON AVE., SUITE 306
LOS ANGELES, CA 90025

ALEXIS K. WODTKE, STAFF ATTORNEY
CONSUMER FEDERATION OF CALIFORNIA
520 S. EL CAMINO REAL, STE. 340
SAN MATEO, CA 94402

MALCOLM YEUNG, STAFF ATTORNEY
ASIAN LAW CAUCUS
939 MARKET ST., SUITE 201
SAN FRANCISCO, CA 94103

MICHAEL OCHOA
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS
& CONSUMER ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PETER A. CASCIATO
A PROFESSIONAL CORPORATION
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107

PATRICK WHITNELL
LEAGUE OF CALIFORNIA CITIES
1400 K STREET
SACRAMENTO, CA 95814

KEVIN SAVILLE
ASSOCIATE GENERAL COUNSEL
CITIZENS/FRONTIER COMMUNICATIONS
2378 WILSHIRE BLVD.
MOUND, MN 55364

ROBERT LEHMAN
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS
& CONSUMER ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LESLA LEHTONEN
VP LEGAL & REGULATORY AFFAIRS
CALIFORNIA CABLE
TELEVISION ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

MARK T. BOEHME
ASSISTANT CITY ATTORNEY
CITY OF CONCORD
1950 PARKSIDE DRIVE
CONCORD, CA 94510

MARIE C. MALLIETT
THE COMMUNICATIONS WORKERS
OF AMERICA
2870 GATEWAY OAKS DRIVE, SUITE 100
SACRAMENTO, CA 95833-3509

PETER DRAGOVICH
ASSISTANT TO THE CITY MANAGER
CITY OF CONCORD
1950 PARKSIDE DRIVE, MS 01/A
CONCORD, CA 94519

RANDY CHINN
SENATE ENERGY UTILITIES &
COMMUNICATIONS
STATE CAPITOL, ROOM 4040
SACRAMENTO, CA 95814

REGINA COSTA
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

RANDLOPH W. DEUTSCH
SIDLEY AUSTIN LLP
555 CALIFORNIA STREET, SUITE 2000
SAN FRANCISCO, CA 94104

RHONDA J. JOHNSON
VP-REGULATORY AFFAIRS
AT&T CALIFORNIA
525 MARKET STREET, ROOM 1923
SAN FRANCISCO, CA 94105

ROBERT GNAIZDA
POLICY DIRECTOR/GENERAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLOOR
BERKELEY, CA 94704

ROY MORALES
CHIEF LEGISLATIVE ANALYST
CIYT OF LOS ANGELES
CITY HALL
200 N. SPRING STREET, 2ND FLOOR
LOS ANGELES, CA 90012

ROBERT A. RYAN
COUNTY COUNSEL
COUNTY OF SACRAMENTO
700 H STREET, SUITE 2650
SACRAMENTO, CA 95814

SINDY J. YUN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVEN LASTOMIRSKY
DEPUTY CITY ATTORNEY
CITY OF SAN DIEGO
1200 THIRD AVENUE, 11TH FLOOR
SAN DIEGO, CA 92101

SCOTT MCKOWN
C/O CONT OF MARIN ISTD
MARIN TELECOMMUNICATION AGENCY
371 BEL MARIN KEYS BOULEVARD
NOVATO, CA 94941

SUE BUSKE
THE BUSKE GROUP
3001 J STREET, SUITE 201
SACRAMENTO, CA 95816

SUSAN WILSON
DEPUTY CITY ATTORNEY
RIVERSIDE CITY ATTORNEY'S OFFICE
3900 MAIN STREET, 5TH FLOOR
RIVERSIDE, CA 92522

SYREETA GIBBS
AT&T CALIFORNIA
525 MARKET STREET, 19TH FLOOR
SAN FRANCISCO, CA 94105

THALIA N.C. GONZALEZ
LEGAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVE., 2ND FLOOR
BERKELEY, CA 94704

TRACEY L. HAUSE
ADMINISTRATIVE SERVICES DIRECTOR
CITY OF ARCADIA
240 W. HUNTINGTON DRIVE
ARCADIA, CA 91007

TOM SELHORST
AT&T CALIFORNIA
525 MARKET STREET, 2023
SAN FRANCISCO, CA 94105

TIMOTHY J. SULLIVAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5204
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM JOHNSTON
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC & DECISION ANALYSIS BRANCH
AREA 3-F
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM IMPERIAL
TELECOMMUNICATIONS REG. OFFICER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1255
200 N. MAIN STREET
LOS ANGELES, CA 90012

WILLIAM K. SANDERS
DEPUTY CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY
1 DR. CARLTON B. GOODLETT PLACE, ROOM
234
SAN FRANCISCO, CA 94102-4682

WILLIAM H. WEBER, ATTORNEY AT LAW
CBeyond COMMUNICATIONS
320 INTERSTATE NORTH PARKWAY
ATLANTA, GA 30339

WILLIAM L. LOWERY
MILLER & VAN EATON, LLP
400 MONTGOMERY ST., SUITE 501
SAN FRANCISCO, CA 94103

WILLIAM L. LOWERY
MILLER & VAN EATON, LLP
580 CALIFORNIA STREET, SUITE 1600
SAN FRANCISCO, CA 94104

ROB WISHNER
CITY OF WALNUT
21201 LA PUENTE ROAD
WALNUT, CA 91789

AARON C. HARP
OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
3300 NEWPORT BLVD
NEWPORT BEACH, CA 92658-8915